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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~285.~~ 651

THE PROVIDENCE STEAM-ENGINE COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES HUBBARD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED OCTOBER 21, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 285.

THE PROVIDENCE STEAM-ENGINE COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES HUBBARD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

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3 Circuit court of the United States, district of Connecticut.

THE PROVIDENCE STEAM-ENGINE COMPANY
vs.
CHARLES HUBBARD.

To the hon. the judges of the circuit court of the United States and district of Connecticut:

The petition of the above-named Providence Steam Engine Company, plaintiffs in the above-entitled action, respectfully represents that it is aggrieved by the final judgment rendered against them in the said action upon the docket of this court, and is informed that there is error therein to its prejudice, and they are desirous that a writ of error be allowed them therefrom to the Supreme Court of the United States.

Wherefore it prays that a writ be allowed to it, returnable to
4 the next term of the Supreme Court of the United States, and that the same may operate as a supersedeas.

THE PROVIDENCE STEAM-ENGINE COMPANY,
By its att'y, CHA'S E. PERKINS.

Circuit court of the United States, district of Connecticut.

THE PROVIDENCE STEAM-ENGINE COMPANY
vs.
CHARLES HUBBARD.

Know all men by these presents that I, Charles E. Perkins, of Hartford, in said State and district, am holden and firmly bound unto Charles Hubbard, of Middletown, in said State, in the sum of two
5 hundred dollars to be paid to him, his heirs, executors, administrators and assigns; to which payment, well and truly to be made, I do hereby bind myself, my heirs, executors, and administrators, by these presents.

The condition of this deed is such, that whereas, at a circuit court of the United States, second judicial circuit, holding sessions in and for the district of Connecticut, in a suit depending in said circuit court, wherein The Providence Steam-Engine Company is plaintiff, and Charles Hubbard is defendant, judgment was rendered against the plaintiff, and it having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgement in the
6 aforesaid suit, and a citation addressed to the said Charles Hubbard, citing and admonishing him to be and appear at the Supreme Court of the United States, at the term thereof holden on the second Monday of October, A. D. 1876:

Now, therefore, if the said Providence Steam Engine Company shall prosecute its said writ of error to effect, and answer such judgement and all damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise, to be and remain in full force and effect.

Signed and sealed this 29th day of May, A. D. 1876.

CHA'S E. PERKINS. [L. S.]

7 Circuit court of the United States.

PROVIDENCE STEAM-ENGINE COMPANY }
vs.
CHARLES HUBBARD. }

On motion of Charles E. Perkins, of counsel for the above-named Providence Steam-Engine Company, and on filing the petition thereof representing that it is aggrieved by the judgement rendered against it therein, and praying a writ of error therefrom to the Supreme Court of the United States, it is ordered that a writ of error be allowed to the next term of the Supreme Court of the United States, and that the same operate as a supersedeas upon the plaintiff filing a bond conditioned according to law, in the penal sum of two hundred dollars, signed by Charles E. Perkins, of said Hartford.

N. SHIPMAN,
One of the Judges of the Circuit Court for the Second Circuit.

8 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the second circuit, greeting:

Because in the record and proceedings, as also in the rendition of a judgement in a plea which is in the said circuit court before you, between The Providence Steam Engine Company, a corporation organized under and by virtue of the laws of the State of Rhode Island, and located in Providence, in said State, plaintiff, and Charles Hub-
9 bard, of Middletown, in the State of Connecticut, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by their complaint appears: and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1876, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid
10 being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 29th day of May, A. D. 1876.

[SEAL.] LOREN P. WALDO,
Clerk of the Circuit Court of the United States for the District of Connecticut in the Second Circuit.

11 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Charles Hubbard, of Middletown, in the State and district of Connecticut, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1876, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the second circuit and district of Connecticut, wherein the Providence Steam Engine

Company, a corporation organized under and by virtue of the
12 laws of the State of Rhode Island, and located and doing business at Providence, in said State, is plaintiff, and you are defendant, to show cause, if any there be, why the judgement rendered against the said plaintiff as in said writ mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 29th day of May, A. D. 1876.

[SEAL.] N. SHIPMAN,
One of the Judges of the Circuit Court for the Second Circuit.

13 HARTFORD, CONN., *May* 29, 1876.

Due and legal service of the foregoing citation and writ of error is hereby acknowledged.

A. P. HYDE,
Attorney for Defendant.

The return of Morrison R. Waite, Chief Justice of the Supreme Court of the United States, to the foregoing writ.

The record proceeding and rendition of judgment of a plea whereof mention is therein made, follows in these words, viz:

PROVIDENCE STEAM ENGINE COMPANY
versus
CHARLES HUBBARD.

Be it remembered that heretofore, to wit, on the 19th day
14 August, A. D. 1874, Charles Hubbard, of Middlefield, in the State and district of Connecticut, and in the second circuit, was attached and summoned to be and appear before the honorable circuit court of the United States for the second circuit and district of Connecticut at the term thereof then next to be held at Hartford, in and for said district, on the third Tuesday of September, A. D. 1874, then and there to answer unto the Providence Steam Engine Company, a corporation organized under the laws of the State of Rhode Island, and located at Providence in said State, and a citizen and resident in said State of
Rhode Island, in an action brought upon a certain statute law of
15 this State, entitled "An act concerning communities and corporations," and especially on the four hundred and thirteenth section of said act, whereupon the plaintiff declares and says:

That heretofore, to wit, on the 17th day of June, 1872, there was, and for a long time theretofore had been, in Middleton, in said State of Connecticut, a corporation organized under and by virtue of the laws of the State of Connecticut, called the Oderless Rubber Company; that on said 17th day of June, A. D. 187 , the said defendant was duly elected president of said corporation and accepted said office and became and thereafter was such president, for the term of one year from such election; that as such president under and by virtue of the statute laws of the State of Connecticut relating to the officers of joint-stock corporations, it became and was his duty to make an annual certificate showing the condition of the affairs *of the affairs* of such corporation, as nearly as the same could be ascertained on the first day of January
16 or July next preceding the time of making such certificate, in the following particulars, viz: The amount of capital actually paid in, the cash value of its real estate, the cash value of its personal estate, the cash value of its credits, the amount of its debts, the number of

shares of each stockholder, and deposit the same on or before the fifteenth day of February or August with the town clerk of said Middletown, in which town said corporation transacted its business.

And the plaintiff further avers that on the 20th day of June, 1871, a certificate was filed in the office *was filed in the office* of the town clerk of said Middletown, in compliance with the provisions of said statute, showing the condition of said company in the particulars required by said statute, upon the first day of January, A. D. 1871, but no certificate was ever thereafter filed showing the condition of said company on the first day of July, 1871, or on the first day of January, A. D. 1872, and the plaintiff alleges that it was the duty of the said
17 defendant, immediately upon his said election and acceptance, to cause to be made and filed a certificate of the condition of said company, in the particulars mentioned in said statute, on the first day of January, A. D. 1872, but that the said def't, his duty in that regard not performing, intentionally neglected and refused to make and file, or cause to be made and filed, a certificate of the condition of the company on the first day of January, 1872, in the particulars required by said statute and hereinbefore referred to, and ever since has intentionally neglected and refused so to do, and no such certificate has ever been made and filed; and the plaintiff avers that during the month of June, 1872, the said corporation contracted a debt with the plaintiff for goods, wares, and merchandise sold during said period by the plaintiff to said company, to a large amount, to wit, of the amount of five thousand dollars, which debt is still due and payable, with interest.

18 And the plaintiff says that, by reason of the premises and by force of the said statute, an action hath accrued to the plaintiff to have and recover of the defendant the amount of said debt, to wit, the sum of five thousand dollars, with interest, which sum the def't has never paid, tho' often requested and demanded, and to recover which, with costs, the plaintiff brings this suit.

19 And at the said term of court to which said writ was made returnable, the said plaintiffs, by Charles E. Perkins, esqr., and the defendants, by Messrs. Alvan P. Hyde and Arthur B. Calef, duly appeared, and said cause was thereon duly continued.

And on the 15th day of September, A. D. 1875, to which time the defendant had leave to implead to the said declaration of the plaintiffs, came the defendant, by his said attorneys, and filed in court his plea, in the words following, viz:

20 United States circuit court, district of Connecticut.

THE PROVIDENCE STEAM ENGINE CO.)
vs.)
CHARLES HUBBARD.)

The defendant denies the truth of the matters alleged in the plaintiff's declaration and puts himself on the jury for trial.

By HUBBARD & HYDE,
His Att'ys.

The plaintiff will take notice that on the trial of the above entitled case on the above issue, the defendant will claim and offer evidence to prove that the Odorless Rubber Company, named in the plaintiff's decla-

ration, is a joint-stock corporation, organized under the laws
21 of this State. That on and long before the 10th day of June, A. D. 1872, said corporation was greatly embarrassed in its business, and was and long had been wholly unable to pay its debts, and was deeply insolvent. That the directors and other officers and agents of said corporation, or some of them, then were and long had been liable as endorsers or otherwise, and had become and were responsible for the debts and obligations of said corporation, and said corporation had mortgaged all its real estate and machinery to directors and other officers and agents, or some of them, and had given to them a lien upon the unwrought stock and manufactured goods belonging to said corporation in the hands of its selling agents, to secure them for the liabilities by them so incurred. That the said directors and other officers and agents of said corporation, who had the care and management of the stock, property, affairs, and business of said corporation, and acting in
22 its name and behalf, well knowing the embarrassed and insolvent condition of said corporation, confederated and conspired together for the purpose of giving said corporation a fictitious credit, and in order to deceive and defraud this defendant and other good and worthy citizens of this State and elsewhere, and to induce him and others to subscribe and pay for stock in said corporation to be created or issued by said corporation for that purpose, and to induce this defendant to accept the office of president of said corporation, and to that end did falsely and fraudulently represent to this defendant and to said other citizens of this State and elsewhere, that said corporation was solvent and doing a large and profitable business.

That on the 20th day of June, A. D. 1871, they caused to be prepared and recorded in the town clerk's office, in Middletown, and otherwise to be published, a false and fraudulent statement of the assets and liabilities of said company, whereby it was represented that on the
23 first day of April, A. D. 1871, the amount of capital stock which had been paid into said corporation was two hundred and three thousand and seven hundred and fifty dollars, and that the debts of said company were one hundred and sixty-two thousand two hundred and sixty-three dollars and seventy-four cents, and they were the owners of real estate of the value of $76,164.65, and of personal estate of the value of $313,232.94, showing that said corporation then had a surplus of over and above their capital stock and other liabilities of over twenty three thousand dollars, when in truth and in fact said corporation was at that time insolvent and unable to pay its debts.

That said directors, officers, and agents, with like intent, falsely and fraudulently represented that they had, of the 1st of January, A. D. 1872, made a careful and accurate examination of the affairs of said corporation, and caused to be made and published a pretended statement of the same, and exhibited the same to this defendant, wherein it
24 was represented that on the 1st day of January, 1872, the capital of said corporation, then actually paid, amounted to the sum of $206,750.00, and that said corporation was then owing only the sum of $193,765.33; that it then had in goods manufactured and in raw material and in good debts due the corporation property to the amount of $201,837.05, and that its real estate and machinery and other property amounted to $248,366.14, and that its whole assets were of the value of $450,203.14, and it then had a surplus of assets over and above all its capital and liabilities amounting to $49,687.86; and they further represented that said corporation since said 1st of January, A. D. 1872, had done a successful business, and had made additional profits exceeding

the sum of twenty-eight thousand dollars, and that, by reason of the success of said corporation, and the prosperous condition of its
25 affairs, its directors had been able to make, and did, in February, A. D. 1872, make a stock dividend of fifteen per cent. on its capital stock out of said profits to all its stockholders, and that the condition of said corporation on said 10th day of June, 1872, was as good as it was when said examination and report was made, January 1st, 1872, and better even by the sum of twenty-eight thousand dollars, being the profits actually made since that time, and that the indebtedness of said corporation had been reduced since said examination and statement had been made. But that, to enable said corporation to prosecute its business to greater advantage and profit, it was desirable to increase its capital stock, so that it could have a larger amount of cash at its command for working capital; and, as a further inducement to this defendant and others to subscribe for such new stock, said directors and other officers and agents of said corporation then and there further represented that the stockholders of said corporation had reduced
26 the old capital stock of said corporation thirty per cent., and that said corporation had thereupon increased the capital stock of said corporation by creating new capital stock to the amount desired, to wit, one hundred and thousand dollars, and would allow said subscribers to have said new stock at the rate of eighty-five per cent. of its par value.

And this defendant, relying on said representations, statements, and declarations of said directors, officers, and agents of said corporation, and believing them to be true, and believing that said old stock had been reduced, and that said new stock had been legally and properly created, then and there subscribed for 200 shares of said new stock, amounting, at its par value, to the sum of 5,000 dollars, such subscription having been made on the express condition that the stock so subscribed for by him should be fully paid whenever 85 per cent. of
27 the par value should have been paid into the treasury of the company, and upon the further express condition that said subscription should not be valid until said old stock should have been reduced thirty per cent. as represented. That the defendant, believing said condition to have been complied with, afterwards paid on his said subscription the sum of 3,300 dollars.

That on the 17th day of June, A. D. 1872, the defendant was elected president of said company, and believing said condition of said subscription to have been complied with, accepted said office, and for a time acted as president of said corporation until he ascertained that such representations were false.

That the amount subscribed for said new stock amounts to the sum of $130,000, and there has been paid thereon in cash to said corporation the sum of $60,000, all of which was immediately expended in payment of the debts of said corporation on which the said officers, directors, and agents, or some of them, by reason of their indorsements, or
28 otherwise, had become and were personally responsible.

That all the said representations, statements, and declarations of said directors, officers, and agents were false, fraudulent, and untrue; that said pretended capital of $206,750.00 had never been paid in in cash, or its equivalent; that the debts of said corporation on said 1st day of January, 1872, and at the time of said false and fraudulent representations, exceeded the said sum of $193,765.33, and amounted to more than $300,000; that said corporation did not then have on hand in manufactured goods and in raw material, and in debts due to the corporation,

property amounting to the sum of $291,837.05, but on the contrary, did not have on hand of such property an amount to exceed the sum of $100,000, and that the value of the real estate, machinery, and other property of said corporation did not exceed $100,000, and their
29 whole assets did not exceed the sum of $200,000; that said corporation had not made any profits in its said business after said first day of January, 1872, but on the contrary, was wholly insolvent and bankrupt, and that said corporation, and the stockholders thereof, did not reduce the old capital stock 30 per cent., nor did said corporation increase the capital stock of said corporation, by creating new capital, nor has any such new stock ever been legally created or issued, all of which was well known to said directors, officers, and agents at the time of making said false and fraudulent representations and statements.

That this defendant and the other subscribers of said pretended new stock did not discover said fraud, which had been practiced upon them, till on or about the 15th day of July, A. D. 1872; but immediately upon such discovery notified said corporation that they repudiated said contract and denied all farther liability on account of said subscrip-
30 tion for such pretended new stock, and demanded the repayment of the money, which by reason of said fraud they had been induced to pay to said corporation.

That immediately after being so chosen as president of said corporation, the defendant endeavored to ascertain the financial condition of the company; that owing to the condition of the books and papers of said company it was impossible for him so to do, except that he was satisfied that the said representations to himself and other parties who had subscribed to said new stock were unreliable; that soon afterwards he so reported to the directors, whereupon a committee was appointed on behalf of said company to make an inventory of its assets, and to ascertain and report its financial condition.

That when the defendant was so chosen president he had no knowledge that the officers of said company had neglected to make to the town clerk of said Middletown the report required by law,
31 showing the condition of said company on the first day of July, A. D. 1871, or on the first day of January, A. D. 1872.

That this defendant did not intentionally neglect or refuse to make or file with the town clerk a certificate of the condition of the company, but on the contrary, he in connection with said committee after his said election as president made diligent effort during the short time he so acted as president, to ascertain the condition of the company.

That during such investigations and after the 16th day of July, A. D. 1872, he discovered that the officers of said company had not made and filed the certificates required by law showing the condition of said company on the 1st of July, A. D. 1871, or on the 1st of January, A. D. 1872.

That the defendant and said committee were unable to complete their investigations and make a report showing even approximately the then condition of said company till on or about the 1st day of Sep-
32 tember, A. D. 1872. That thereupon, to wit, on the second day of September, this defendant prepared a certificate and filed the same with the town clerk of said Middletown, showing the then condition of said company so far as he was able to ascertain the same as required by said statute of Connecticut.

That soon after the election of this defendant as president of said corporation, said corporation stopped business, and that after said subscription by this defendant and his said election as president, but few debts

the sum of twenty-eight thousand dollars, and that, by reason of the success of said corporation, and the prosperous condition of its
25 affairs, its directors had been able to make, and did, in February, A. D. 1872, make a stock dividend of fifteen per cent. on its capital stock out of said profits to all its stockholders, and that the condition of said corporation on said 10th day of June, 1872, was as good as it was when said examination and report was made, January 1st, 1872, and better even by the sum of twenty-eight thousand dollars, being the profits actually made since that time, and that the indebtedness of said corporation had been reduced since said examination and statement had been made. But that, to enable said corporation to prosecute its business to greater advantage and profit, it was desirable to increase its capital stock, so that it could have a larger amount of cash at its command for working capital; and, as a further inducement to this defendant and others to subscribe for such new stock, said directors and other officers and agents of said corporation then and there further represented that the stockholders of said corporation had reduced
26 the old capital stock of said corporation thirty per cent., and that said corporation had thereupon increased the capital stock of said corporation by creating new capital stock to the amount desired, to wit, one hundred and thousand dollars, and would allow said subscribers to have said new stock at the rate of eighty-five per cent. of its par value.

And this defendant, relying on said representations, statements, and declarations of said directors, officers, and agents of said corporation, and believing them to be true, and believing that said old stock had been reduced, and that said new stock had been legally and properly created, then and there subscribed for 200 shares of said new stock, amounting, at its par value, to the sum of 5,000 dollars, such subscription having been made on the express condition that the stock so subscribed for by him should be fully paid whenever 85 per cent. of
27 the par value should have been paid into the treasury of the company, and upon the further express condition that said subscription should not be valid until said old stock should have been reduced thirty per cent. as represented. That the defendant, believing said condition to have been complied with, afterwards paid on his said subscription the sum of 3,300 dollars.

That on the 17th day of June, A. D. 1872, the defendant was elected president of said company, and believing said condition of said subscription to have been complied with, accepted said office, and for a time acted as president of said corporation until he ascertained that such representations were false.

That the amount subscribed for said new stock amounts to the sum of $130,000, and there has been paid thereon in cash to said corporation the sum of $60,000, all of which was immediately expended in payment of the debts of said corporation on which the said officers, directors, and agents, or some of them, by reason of their indorsements, or
28 otherwise, had become and were personally responsible.

That all the said representations, statements, and declarations of said directors, officers, and agents were false, fraudulent, and untrue; that said pretended capital of $206,750.00 had never been paid in in cash, or its equivalent; that the debts of said corporation on said 1st day of January, 1872, and at the time of said false and fraudulent representations, exceeded the said sum of $193,765.33, and amounted to more than $300,000; that said corporation did not then have on hand in manufactured goods and in raw material, and in debts due to the corporation,

property amounting to the sum of $201,837.05, but on the contrary, did not have on hand of such property an amount to exceed the sum of $100,000, and that the value of the real estate, machinery, and other property of said corporation did not exceed $100,000, and their
29 whole assets did not exceed the sum of $200,000; that said corporation had not made any profits in its said business after said first day of January, 1872, but on the contrary, was wholly insolvent and bankrupt, and that said corporation, and the stockholders thereof, did not reduce the old capital stock 30 per cent., nor did said corporation increase the capital stock of said corporation, by creating new capital, nor has any such new stock ever been legally created or issued, all of which was well known to said directors, officers, and agents at the time of making said false and fraudulent representations and statements.

That this defendant and the other subscribers of said pretended new stock did not discover said fraud, which had been practiced upon them, till on or about the 15th day of July, A. D. 1872; but immediately upon such discovery notified said corporation that they repudiated said contract and denied all farther liability on account of said subscrip-
30 tion for such pretended new stock, and demanded the repayment of the money, which by reason of said fraud they had been induced to pay to said corporation.

That immediately after being so chosen as president of said corporation, the defendant endeavored to ascertain the financial condition of the company; that owing to the condition of the books and papers of said company it was impossible for him so to do, except that he was satisfied that the said representations to himself and other parties who had subscribed to said new stock were unreliable; that soon afterwards he so reported to the directors, whereupon a committee was appointed on behalf of said company to make an inventory of its assets, and to ascertain and report its financial condition.

That when the defendant was so chosen president he had no knowledge that the officers of said company had neglected to make to the town clerk of said Middletown the report required by law,
31 showing the condition of said company on the first day of July, A. D. 1871, or on the first day of January, A. D. 1872.

That this defendant did not intentionally neglect or refuse to make or file with the town clerk a certificate of the condition of the company, but on the contrary, he in connection with said committee after his said election as president made diligent effort during the short time he so acted as president, to ascertain the condition of the company.

That during such investigations and after the 16th day of July, A. D. 1872, he discovered that the officers of said company had not made and filed the certificates required by law showing the condition of said company on the 1st of July, A. D. 1871, or on the 1st of January, A. D. 1872.

That the defendant and said committee were unable to complete their investigations and make a report showing even approximately the then condition of said company till on or about the 1st day of Sep-
32 tember, A. D. 1872. That thereupon, to wit, on the second day of September, this defendant prepared a certificate and filed the same with the town clerk of said Middletown, showing the then condition of said company so far as he was able to ascertain the same as required by said statute of Connecticut.

That soon after the election of this defendant as president of said corporation, said corporation stopped business, and that after said subscription by this defendant and his said election as president, but few debts

were contracted by said corporation, all the liabilities incurred by said corporation after that date being less than the amount of cash payments made by the subscribers to said new stock, and that most of the debts now outstanding against said corporation accrued prior to June 10th, 1872, and that no certificate that the capital stock of said corporation had been so increased, signed by the president and directors of
33 said corporation, as required by law, has ever been published in any newspaper or deposited with the town clerk of said Middletown where said corporation is located, or with the secretary of this State.

That immediately after making said certificate and filing the same, to wit, on the 3d day of September, A. D. 1872, this defendant resigned his position as president or director of said corporation, which said resignation was accepted, and this defendant thereupon ceased to be connected with said corporation.

And this defendant will further claim and offer evidence to prove that said debt claimed by this plaintiff against said corporation was not contracted while this defendant was so acting as president, but, on the contrary, the same was contracted long prior to this defendant's being interested in said corporation as stockholder or otherwise, to wit, in the month of March, A. D. 1872, and that this defendant had no knowl-
34 edge of said contract when it was made, or that this defendant had anything to do with said contract after his said election a president, or that any credit was given by the plaintiffs to said corporation by reason of anything done or omitted to be done by this defendant.

And at the term of said court held at New Haven, within and for said second circuit and district of Connecticut, the said parties appeared and were at issue as aforesaid, and being then fully heard, and there appearing to be no issue of fact made by the parties, the jury, on the motion of the defendant and by direction of the court, returned their verdict as follows:

United States circuit court, district of Conn. April term, 1876.

THE PROVIDENCE STEAM ENGINE CO. }
vs. }
CHARLES HUBBARD. }

In this cause the jury find the issue for the defendant, & therefore find for the defendant to recover his costs.

35 And thereupon it is considered and adjudged by the court here that the issue is for the defendant, and that he do recover of the plaintiff his costs, taxed this 9th day of May, A. D. 1876, at the sum of seventy-two dollars and fifty-nine cents, and that he have executions therefor.

The plaintiffs then filed in court their bill of exceptions to said judgment, in the words & figures following, viz:

36 *Bill of exceptions.*

Circuit court of the United States, district of Connecticut.

THE PROVIDENCE STEAM-ENGINE CO.
vs.
CHARLES HUBBARD.

Be it remembered, that upon the above-entitled cause the pl'ff offered evidence to prove the following facts:

That the Odorless Rubber Co. was a joint-stock corporation, legally organized under the laws of the State of Conn't relating to joint-stock corporations, and in the year 1870 was located at Middletown, in s'd State.

That C. C. Post was elected pres. of said co. on the 9th day of September, 1870, and was re-elected at the annual meetings in April, 1871, and April, 1872, and continued to hold s'd office till his resignation on the 17th of June, 1872, and during all s'd period there was a sec'y of s'd co.

37 That neither the said pres. or the s'd sec'y did at any time during all s'd period file with the town clerk of Middletown the certificate to be so filed by them on the 15th day of Feb. or the 15th day of Aug. in each year, of the conditions and assets of s'd co. on the 1st day of Jan. or the 1st day of July during s'd year, as required by the 404 sec. of the laws of the State of Conn. relating to corporations, except that the s'd Post as pres. and Rob't Sugden, who was then sec'y, did, on the 20th day of June, A. D. 1871, file such certificate, showing the condition and assets of s'd co. on the 1st day of April, A. D. 1871.

That on the 10th day of June, A. D. 1872, the def't, Cha's Hubbard, who had not been, prior to that time, a stockholder in s'd co., signed a subscription paper, a copy of which is hereto annexed, marked A, for 200 shares of new stock of s'd co., and on the 18th day of June, A. D. 1872, p'd $1,850 on acc't of s'd subscription, and it was proved that over

38 $10,018 were subscribed thereto; but no evidence was offered that the 30 per ct. deduction of the old stock had been made, as provided in s'd subscription paper.

That on the 17th day of June, A. D. 1872, the s'd C. C. Post resigned his s'd office of pres. of s'd co., and on s'd day the board of directors of s'd co. elected Cha's Hubbard, the def't, pres. of s'd corporation in his place; but it did not appear that s'd Hubbard was ever elected a director of s'd corporation.

That said Hubbard did not accept s'd office in writing, but acted thereafter as a stockholder, and thereafter acted as president, and continued to act as such till the 2nd day of Sept., A. D. 1872, when he resigned said office; that after the election of s'd Hubbard up to 2nd day of Sept., A. D. 1872, no statement of the condition and assets of s'd co. so required to be filed as aforesaid had ever been so filed, but that on s'd 2nd day of September the def't with the sec'y made out and filed a certificate of the condition and assets of s'd co. upon the 1st day of July, A. D. 1872.

39 That on the 8th day of March, A. D. 1872, the pl'ffs, then being a corporation duly organized under the laws of, and located in the State of Rhode Island, entered into a certain written agreement with the s'd Odorless Rubber Co., a copy of which is hereto annexed and marked B, by which they agreed to furnish a steam engine for about the sum of $6,000, and in pursuance of s'd agreement the

Supreme Court of the United States.

BRIEF OF MR. PERKINS,

Counsel for Plaintiff in Error.

PROVIDENCE STEAM ENGINE COMPANY,
Plaintiff in Error,

vs.

CHARLES HUBBARD.

No. 285.

OCTOBER TERM, 1878.

In Error from Circuit Court of the District of Connecticut.

Supreme Court of the United States.

THE PROVIDENCE STEAM ENGINE COMPANY,

PLAINTIFF IN ERROR,

VS.

CHARLES HUBBARD.

OCTOBER TERM, 1878.

No. 285.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF CONNECTICUT.

BRIEF OF MR. PERKINS,

OF COUNSEL FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

The laws of the State of Connecticut require that the president and secretary of every joint stock corporation organized under the laws of that State, file with the town clerk of the town in which such corporation is located, a certificate of the financial con[illegible]ion of the company, and on their neglect so to do, makes t[illegible] personally liable for all the debts contracted during the [illegible]uch neglect continues. The sections of the statute are [illegible]inafter given at length.

In the year 1872, there was and therefore had been a joint stock corporation, located in Middletown, in the State of Connecticut, called the Odorless Rubber Company.

C. C. Post was elected president of the company, September 9th, 1870, and was re-elected at the annual meetings in April, 1871, and April, 1872, and continued such president until June 17th, 1872, when he resigned and the defendant was elected in his place, and acted as president until September 2d, 1872, when he also resigned.

During all this time no certificates of the financial condition of the company were filed except one by said Post, June 20th, 1871, showing the condition of the company, April 1st, 1871, and one by the defendant on September 2d, 1872, showing the condition of the company, July 1st, 1872.

On the 10th day of June, 1872, the defendant, with others, signed the following agreement:

We, the undersigned, hereby agree to take the number of shares of the capital stock of the Odorless Rubber Company placed opposite our respective names, and pay for the same as follows, to wit: six dollars and twenty-five cents per share, whenever cash subscription to the amount of one hundred and eighteen thousand dollars shall have been made, and the balance in equal monthly installments of ten per cent., each, from the date of June 1st, A.D. 1872. Said stock to be fully paid whenever 85 per cent. of the par value shall have been paid into the treasury of the company, it being understood that none of said subscriptions shall be valid or obligatory until at least said amount of one hundred and eighteen thousand dollars of shall have been subscribed as aforesaid, and that 30 per cent. deduction is made on the old stock of this company as per vote of stockholders, June 10th, 1872.

Dated at Middletown, this tenth day of June, 1872.

Before this date the defendant had not been a stockholder or connected with the company; his name was affixed to this paper for two hundred shares, and it was proved that one hundred and eighteen thousand dollars cash subscription was

made, but it was not proved that thirty per cent. deduction from the old stock was ever made. The defendant, however, on the 18th day of June, 1872, paid the first installment due on his said stock, amounting to $1,850, and thereafter acted as a stockholder, but it did not appear that he was ever elected a director.

On the 8th day of March, 1872, the plaintiff made an agreement in writing with the Odorless Rubber Company, to furnish a steam engine for the sum of $5,700. On the 21st day of June, 1872, the plaintiff shipped the engine to the Rubber Company; it was set up in the early part of July, and on the 18th day of July, 1872, the Rubber Company accepted it, paid part of the price in cash, and gave the plaintiff its note for part of the balance, which was never paid, and the amount due to the plaintiff when this suit was brought, was over five thousand dollars.

The defendant had no communication with the plaintiffs about this engine, nor did the plaintiff know that the defendant had been elected president, or had acted as such.

In October, 1872, the Rubber Company became bankrupt.

The plaintiff, on the 19th day of August, 1874, brought its action at law against the defendant to recover from him the amount due as aforesaid, on the ground that he had neglected to make the proper certificate, returnable to the United States Circuit Court for the District of Connecticut, and upon the trial proved the foregoing facts and rested. The defendant then requested the Court to instruct the jury, as matter of law, that upon the above facts they should render a verdict for the defendant, to which the plaintiff objected, but the court did so instruct the jury, who thereupon rendered a verdict for the defendant.

The plaintiff filed a bill of exceptions, which was allowed, and he thereupon brought a writ of error to this court to review the said decision.

The Statutes of the State of Connecticut on this subject are as follows:

Revised Statutes of Connecticut, revision of 1866, page 172, section 404.

"The president and secretary of every corporation organized under the provisions of this chapter, shall annually make a certificate showing the condition of the affairs of such corporation as nearly as the same can be ascertained, on the first day of January or July, next preceding the time of making such certificate, in the following particulars, viz.: The amount of capital actually paid in, the cash value of its credits, the amount of its debts, the name and number of shares of each stockholder, which certificate shall be deposited on or before the fifteenth day of February, or of August, with the town clerk of the town in which said corporation transacts its business, who shall record the same at full length in a book to be kept by him for that purpose."

Also page 174, section 413:

"If the president or secretary of any such corporation shall intentionally neglect or refuse to comply with the provisions of the four hundred and fourth section of this act, and to perform the duty required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of such neglect or refusal."

ASSIGNMENT OF ERRORS.

The only error is the direction of the court to the jury to return a verdict for the defendant upon the facts proved. There was no written opinion filed; but to be within the spirit of the rule relating to the assignment of errors, I will here state what I understand to be the grounds upon which the defendant claims the decision to be correct, viz.:

1st. He claims that the defendant was never legally the president.

2d. If he was so, this debt was not "contracted" while he was so president.

3d. By the proper construction of the statutes cited, the defendant is not liable, even if the two first points are not sound.

POINTS.

1.

It is claimed by the defendant that he never was president, because it was not proved that he was a director, and because his subscription to the stock was conditional and the condition was never complied with.

1st. It was not necessary for the plaintiff to prove that the defendant was a director when he was elected president.

In U. S. Bank *vs.* Dandredge, 12 Wheaton, 79, Judge Story says, "Persons acting publicly as officers of the corporation are to be presumed to be rightfully in office."

Angell and Ames on Corporations, § 139.

Having shown that the defendant was elected president, the court will assume that he was qualified to be so elected, unless he was proved to be otherwise.

2d. It is claimed that he was not legally president because he was not a stockholder, the condition of his subscription not having been complied with.

The only condition of the subscription was that "none of said subscriptions shall be valid or obligatory until at least said sum of one hundred and eighteen thousand dollars of —— shall have been subscribed as aforesaid." And it is found that this was done (the bill of exceptions by mistake prints it $10018, but it is $118,000 in the original).

The words "and that 30 per cent. deduction," etc., relate to "understood," and not to "shall be valid."

This is evident from the fact that in the first part of the subscription paper, the first installment is agreed to be paid when the $118,000 is subscribed. If the validity of the sub-

scription was to depend on a reduction of the capital also, no installment would be payable till that was done.

Even if this subscription was conditioned on a reduction of the stock being made, the payment of $1,850 on the stock, the acting as a stockholder, etc., would be a waiver.

3. But the most decisive answer to these objections is, that whether the election of the defendant as president was in all respects legal or not, he *was* the president. He was elected, accepted the office, and acted as president, and being one *de facto* was bound to perform the duties attached to the office, and liable to the penalties provided for their non-performance.

In Thayer *vs.* N. E. Lithographic Co., 108 Mass., 523, this same question arose, and the Court say on p. 527, "The persons joined with the corporation as defendants, were acting as directors during the whole period within which these debts were contracted. They are therefor liable as such, if any liability exists, notwithstanding the irregularity or informality of the meetings at which they were elected."

See Newcomb *vs.* Reed, 12 Allen, 362.
Angell on Corporations, § 137, 139, § 286.
McCall *vs.* Byram Mfg. Co., 6 Conn., 428 (435).
Haynes *vs.* Brown, 36 N. H., 545.

II.

The debt due the plaintiff was "contracted" while the defendant was president.

It is true that it was so contracted under an agreement executed before, but that agreement did not create this liability. No claim ever existed on the part of the plaintiff against the Rubber Company, until the 18th of July, 1872, when the engine was accepted. Up to that time it remained the property of the plaintiff. No action could have been

brought by the plaintiff against the Rubber Co., nor could any debt have been attached in the hands of the plaintiff by creditors of the Rubber Company.

Bond *vs.* Clark, 6 Allen, 361.

III.

It appearing, then, that the defendant was president at the time that this debt was contracted, and that no certificate was ever filed by him, or by any one else during the year 1872 in the time and manner provided by the statute, why is he not liable?

1. It may be claimed that it was not proved that he "intentionally" neglected to comply with the law.

The defendant knew his duty: every one is bound to know the law, and he neglected it without any excuse. The intent is to be assumed from the act; it can be proved in no other way. The statute does not mean that a plaintiff must show the inward thought of the defendant. It only intends to cover cases when from sickness, absence, or other cause a president was unable to comply. Otherwise the statute would be useless, as it would only be necessary for a defendant to say that he didn't think of it.

Ignorance of the statute is no excuse, and an omission to perform its provisions is wilful, without regard to the real intent or motive.

Quimby *vs.* Waters, 4 Dutcher, 537.

Directors are chargeable with knowledge of the provisions of the law regulating their duties, or imposing liabilities on them.

Van Etten *vs.* Eaton, 19 Mich., 187.

2. But it is claimed that this defendant is liable only for his own neglect, and not for those of the former ones, and that at the time this debt was contracted he had not neglected his duty. That depends on the construction of the statute, and no better rule of construction can be given than that laid down in Norfolk *vs.* Am. Gas Co., 103 Mass., 160. On p. 162 the court says: "The provisions of the statute under consideration are not to be construed with that technical strictness which prevails in the exposition of penal statutes, but should receive such reasonable construction as will best carry out the intentions of the legislature, and the spirit of the enactments."

The object of the legislature of Connecticut, in passing this act, clearly was, that there should be a statement of the condition of the company published at least once a year, for the information of the public, and if it was not so published, the creditors should have the additional security of the personal liability of the president and secretary.

Now here no certificate had been filed of any kind since June 20, 1871, and even this was not made in pursuance of the statute.

At the very farthest it was the duty of the defendant to file a statement on or before the 15th of August, and as he did not do this, he became liable for all debts contracted while he was president.

It is not within any fair construction of the statute to say that he had until the 15th of August to file the statement, and was not guilty of any neglect until that time. His neglect to do it then, made him liable for debts contracted before, as well as after, the 15th.

Any other construction would be absurd, and would enable a president to avoid the statute, by filing no statements, and making all his purchases in the six weeks after the 1st of January or July.

There has been no decision in Connecticut construing this statute, and there is no statute in any other State exactly like it, so far as I know, but there are decisions in New York, on a similar statute, which throw much light on the subject.

In Boughton *vs.* Otis, 21 N. Y., 261, the case was this: The statute of New York provided that each corporation should make a certificate within twenty days of the first day of January, and if any one should fail so to do "all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, *and for all that shall be contracted before such report shall be made.*"

The difference is that the Connecticut statute makes the officers liable for all debts contracted "during the period of such neglect or refusal," and the New York one for all contracted "before such report shall be made." These expressions evidently have substantially the same meaning, and the decision therefore is in point.

Chief Justice Comstock construing this clause says, on p. 264: "A sounder and juster view of the question, it seems to me, is that a board of trustees guilty of the default in January, and retiring from office, is liable for all antecedent debts, and for those only; and that the successors, if they continue the default until the next January and no longer, *are liable for the debts contracted during that year and for no other.* If the persons succeeding to office promptly obey the requirement of the act, they will escape all liability, and it is plainly just that they should, because there is no failure of duty on their part. If they do not, they very properly incur the hazard of the debts which they themselves as trustees contract."

The same question arose in Shaler & Hall Quarry Co. *vs.* Bliss, 27 New York, p. 297, and Judge Selden, in giving the opinion on page 299, says:

"The object of the provision, so far as relates to creditors,

or persons dealing with the corporation, appears to have been to give such notoriety to the pecuniary condition of the company, through the publication of its annual statements, as to deprive it of credit, if it should be unworthy of it, and to give to persons to whom it might become indebted while the statement should be withheld, the personal responsibility of the trustees for such indebtedness. So much of that object as looks to the security of the creditor dealing with the corporation whilst it is in default, is accomplished by giving to the creditor the personal responsibility of those who are trustees when his debt is created. The theory of the statute in this respect, and of the present action, is, that the plaintiff, not finding the statement published which would have enabled him to decide whether the corporation was entitled to credit, entered into the contract in reliance upon the personal responsibility of the trustees.

Upon that assumption, its reliance must have been upon the trustees who were such when the debt was created, and not upon persons who had ceased to be, or might thereafter become, trustees.

The plaintiff cannot claim that it gave credit, under the provisions of the statute in question, to persons who were not trustees when the debt was contracted.

The true interpretation of the statute, I think, is, that three circumstances must concur in point of time, to render a trustee liable, viz.: the existence of the debt; the existence of the default in making the report; and the trusteeship. Where these concur, the trustee is liable for all debts, if he was such trustee when the default occurred. If he was not a trustee at the time of the default, but became such afterwards, then his liability is limited to debts created while he remains trustee, and while the default continues. These positions are all substantially embraced in the decisions of this court in the cases of Garrison *vs.* Howe (17 N. Y., 458), and Boughton *vs.* Otis (21 id., 261).

The plain letter of the statute, as well as its spirit, is against the liability of the defendants in this case. The only

material words are "the trustees" shall be liable for the debts "that shall be contracted before such report shall be made."

Only those who are trustees when the debts are contracted come within these terms."

See also Vincent *vs.* Sands, 11 Abbott Prac., R., 371.

It will be seen from these decisions that the court implies that this liability may be removed in the case of new officers coming in, by their filing a new certificate at once, or within a reasonable time, and probably that would be the law in Connecticut, as shown by the fact that in 1871, Post, the former president, filed one on the 1st of June, and this defendant on the 2d of September.

This would be a reasonable rule, for the officers ought certainly on their first coming in to find out the condition of the company, and whether the proper certificates have been made before they contract new debts, and if they go on negligently and allow the company to obtain property which it is not able to pay for, they ought to be the ones to suffer, rather than the creditor who has no means of knowing what the condition of the company is except from their reports.

As the New York cases say, if the reports are not made, the creditor has a right to look to the officers personally, and is understood to trust them.

If this court adopts this construction of the New York courts, it is clear that the learned Circuit Court was in error.

But if it does not, I submit that the only claim upon which the ruling below can be sustained is, that the statute gives each new president the privilege of waiting until *either* the 15th of August or the 15th of July next after his election, at his option, whether any certificates have been filed the year before or not, and without regard to the time when they were filed.

That is, if Post, the former president, had filed a certificate

the 15th of August, 1871, the defendant might have waited until the 15th of February, 1873, before filing another, thus making an interval of eighteen months between one and another instead of one year.

But the expression "annual," as well as the reason of the thing, is against this construction. The evident intention of the statute is that the certificates should be filed within a year of each other.

If then, if Post had filed a certificate on or before August 15th, 1871, showing the condition of the company July 1st, 1871, it would have been the duty of the defendant to have filed another August 15th, 1872; much more was it his duty so to do when Post had not filed any.

This statute was passed for the protection of creditors, and should receive a reasonable construction in their favor, and not a strained construction against them to relieve officers who have neglected their duty.

I submit, therefore, that the learned court erred, and the judgment should be reversed.

CHARLES E. PERKINS,
of council for Plaintiff in Error.

Supreme Court of the United States.

THE

PROVIDENCE STEAM ENGINE CO.

vs.

CHARLES HUBBARD.

BRIEF OF DEFENDANT IN ERROR.

A. P. HYDE, Counsel.

Supreme Court of the United States.

THE PROVIDENCE STEAM ENGINE COMPANY,

vs.

CHARLES HUBBARD.

This action is brought by the plaintiffs, creditors of "The Odorless Rubber Company," a joint stock corporation, organized under the laws of the State of Connecticut, to recover of the defendant, who is claimed to have been president of said corporation, the amount of the plaintiff's debt due from said corporation.

The Statute of Connecticut upon which said action is founded is as follows:

Title 7, Chapter 7, Edition of 1866.

Section 404, page 172.

"The president and secretary of every corporation organized under the provisions of this chapter, shall annually make a certificate, showing the condition of the affairs of such corporation as nearly as the same can be ascertained, on the first day of January or of July next preceding the time of making such certificate, in the following particulars, viz.:

"The amount of capital actually paid in: the cash value of its personal estate: the cash value of its credits; the amount of its debts: the name and number of shares of each

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"The amount of capital actually paid in; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the name and number of shares of each

stockholder; which certificate shall be deposited, on or before the fifteenth day of February or of August, with the town clerk of the town in which said corporation transacts its business, who shall record the same at full length in a book to be kept by him for that purpose.* * *"

Section 413, page 174.

"If the president or secretary of any such corporation shall intentionally neglect or refuse to comply with the provisions of the four hundred and fourth section of this act, and to perform the duty required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation, contracted during the period of any such neglect or refusal."

The Odorless Rubber Company was a joint stock corporation, organized under the laws of Connecticut in 1870, and located at Middletown in said State. One C. C. Post was president of the corporation from the 9th of September, A.D. 1870, till the 17th of June, A.D. 1872, during which period there was a secretary of said company. During that period no certificate was filed by said president or secretary, as required by law, except that on the 20th of June, A.D. 1871, they filed such a certificate showing the condition of said company on the 1st of April, 1871.

On the 8th day of March 1872, the plaintiff contracted with the corporation to furnish and set up a steam engine at their works in Middletown for the sum and price of $5,700. In pursuance of this contract, the plaintiffs shipped the engine on the 21st of June, A.D. 1872, and the engine was set up and about the 18th of July, 1872, a cash payment was made and a note given for a part of the balance.

The plaintiffs had no communication with the defendant and had no knowledge that the defendant had been elected, or acted as president.

The defendant had no connection with the company until the 10th day of June, A.D. 1872, when he signed a subscription paper for 200 shares of new stock of said company. This subscription paper was conditioned as follows: "It being understood that none of said subscriptions shall be valid or obligatory until at least said amount of one hundred and eighteen thousand dollars of new stock shall have been subscribed as aforesaid and that 30 per cent. deduction is made on the old stock of this company as per vote of stockholders June 10, 1872."

The condition as to the amount of subscriptions to the new stock was complied with, but the condition providing for the 30 per cent. reduction of the old stock was not complied with.

The defendant was not ever elected a director of the company, but on the 17th of June, 1872. C. C. Post having resigned the office of president, the board of directors elected the defendant president in his place. The defendant did not accept the office in writing, but thereafter acted as president and stockholder until the 2d of September, 1872, when he resigned.

The defendant while acting as president made no certificate, as showing the condition of the company until the 2d day of September, when he and the secretary made and filed a certificate of the condition and assets of the company on the 1st day of July, 1872.

I.

The statute upon which this action is brought is penal, and must be strictly construed.

Under a somewhat similar statute of New York, providing that "On failure of any company within twenty days from the first of January, to make, publish, and file an annual report, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." It has been held repeatedly that the act was penal and could not be extended by construction to cases not fairly within its language.

Garrison *vs.* Howe, 17 N. Y., 458.
Boughton *vs.* Otis, 21 N. Y., 261.
Chambers *vs.* Lewis, 28 N. Y., 454.

In Halsey *vs.* McLean, 12 Allen, 438, it was held that a suit could not be maintained in Massachusetts against the trustees of a New York corporation to enforce their statute liability for debts of the corporation. That the act imposing liability on the trustees for their neglect was penal, and therefore could only be enforced in the State of New York.

So in Derickson *vs.* Smith, 3 Dutcher, 166.

This was a suit against the trustees of a New York corporation to recover a corporate debt because of their failure to make the returns required by law.

It was held the action would not lie in New Jersey, as the act was penal, and could only be enforced in New York.

So in Ohio, a statute provided in substance, that if a bank should at any time become indebted in a sum exceeding twice the capital stock paid in, exclusive of deposits, the directors under whose administration it should happen should be liable for the same in their natural and individual capacities.

In a suit against the directors of the Sandusky Bank, by plaintiffs as creditors of the bank, it was held the defendants were not liable as contractors, but that the act was penal.

Sturges *et al. vs.* Burton *et al.*, 8 Ohio State R., 215.
See also Lawler *et al. vs.* Burt, 7 Ohio State R., 340.

In the First National Bank of Plymouth *vs.* Price *et al.*, 33 Md., 487, it was held that a similar statute of Pennsylvania was a penal statute, and could only be enforced in Pennsylvania.

So in Irwin *vs.* McKeon, 23 California, 472, an act making directors liable for the excess of debts of a corporation over and above the amount of capital stock actually paid in, was held to be a penal statute and must be strictly construed.

So in Indiana, see Union Iron Co. *vs.* Pierce, 4 Biss., 327.

The statute of Indiana provides in substance, that every company incorporated under it shall annually, within twenty days from the first day of January, make and publish a report in a newspaper of the county, etc., of its capital stock, debts, etc., and for any failure, all the officers of the company shall be jointly and severally liable for all the debts of the company, contracted while they are stockholders or officers

thereof. It was held the act was penal, and a repeal of the statute after the commencement of a suit for a debt so contracted defeated the action.

In Bird *vs.* Hayden, 1 Robertson, 383, the suit was against Hayden, as director of the Daggett manufacturing company, a Massachusetts corporation.

The act of Massachusetts provided that in case of neglect to make certain annual returns, the officers should be "jointly and severally personally liable for the payment of the debts of the corporation contracted after such neglect, and before such certificate shall be filed."

Held the act was penal, and hence courts of New York had no jurisdiction.

Same case, 2 Abb. Prac. N. S., 61.

See also Moies *vs.* Sprague, adm., 9 R. I., 541.

II.

The act on which this action is founded being penal, it will not be enforced against this defendant, unless it shall appear that he was legally elected as president, and was under a legal obligation to perform the duties of president.

The defendant was not eligible as president, or lawfully elected as such, and had no legal title to the office.

Section 397 of the statute before referred to, see edition 1866, p. 171, is as follows:

"The stock, property, affairs, and business of every such corporation, shall be under the care of, and shall be managed by, not less than three directors, who shall be chosen annually by the stockholders, at such time and place as shall be provided by the by-laws of said corporation, and who shall be stockholders and shall hold their offices for one year and until others shall be chosen in their stead."

Section 399 of said act was repealed in 1866, and the following enacted in its stead:

"The directors of every joint stock corporation in this State shall choose one of their number to be president, and shall also choose a secretary and a treasurer, and such officers as the by-laws of such corporation shall prescribe, who shall hold their offices until others be chosen in their stead."

Session laws of 1866, p. 47.

The defendant was not a stockholder of the company, unless he became so by signing the conditional subscription paper set out in the bill of exceptions.

As the conditions on which that subscription was made were not complied with, it never became a valid and obligatory subscription, under the terms of the instrument.

This point was determined by this court, in a suit brought against one White, who signed this same subscription paper.

Baker, assignee, *vs.* White, 92 U. S., 176.

If his subscription to the stock was invalid, the defendant never became a stockholder, and hence could not be a director, under the law which expressly provides that directors "shall be stockholders."

Again, the defendant was never elected a director, and hence could not be president. The law expressly says, the directors "shall choose one of their own number to be president."

But it is claimed that the defendant is estopped from denying that he was president, inasmuch as he acted as such.

The question of estoppel does not apply to this case.

The defendant is not here denying the validity of any act actually done by him as president, nor do the plaintiffs claim that they were misled by his acting as president, or that they dealt with the company relying on that fact, for it is admitted that they had no knowledge that the defendant had been elected or acted as president.

It cannot be doubted that upon a proper proceeding by parties interested, the court would have held this election void and the defendant not qualified to act.

Can it be that the same court would subject him to a penalty for not performing other acts as president, when it was not his duty or right to act at all?

If, under a misapprehension of his rights or duties, the defendant has assumed powers which did not belong to him, the most that can be claimed, is that he shall be held responsible for the acts actually done by him.

Craw *vs.* Easterly, 4 Lansing 513.

In this case a trustee of a New York company during the year for which he was elected, sold a part of his stock to the defendant. The stockholders declared his office vacant and

elected the defendant as trustee in his place. The defendant acted as trustee till a short time before the annual return was to be made, when he changed his residence, but did not resign. He did not make the return as required, and ceased to act as trustee after his removal. The court held that his election was invalid, and defendant not liable for the penalty. Judge Johnson in giving the opinion of the court, p. 522, uses the following language:

"As the defendant was not a trustee within the contemplation and meaning of the statute, he is not amenable to the penal imposition of the liability, as was said by Denio, J., in regard to the provision in question in Garrison *vs.* Howe (17 N. Y. 466), 'the provision is highly penal, and the rules of law do not permit us to extend it by construction to cases not fairly within its language.' There is no question of estoppel in the case. It does not appear that the plaintiff dealt with the company or gave it credit on the faith of the defendant, being one of the trustees. The question lying at the foundation of the plaintiffs' claim is, whether the defendant was a trustee of the company for the first year, and charged by statute with the duty of making the report. Even if he might be estopped from disputing the validity of his acts as trustee, so far as he did act, there is nothing in the principle of estoppel to prevent his denying that he had any right or was under any obligation to go further and continue to act as trustee through the year. I am clearly of the opinion that the defendant never became trustee. That he never acquired any right or title to the office, and consequently was never under any duty or obligation to perform the acts required by the statute to be performed by the trustees of the company."

This decision was affirmed in 54 N. Y., 679.

III.

But assuming that the defendant was legally elected president, and chargeable with all the duties of the office, he cannot be held liable in this case for the reason that the debt of the plaintiffs was not contracted while he was in default.

As bearing on this point, we call attention to some important differences between the statute of Connecticut and that of New York, and some of the other States.

By the New York law the duty of making the annual returns is placed on the corporation itself, and the penalty for neglect, upon the trustees who are entrusted with the management of its affairs. As it is a corporate duty, each succeeding board of trustees are bound to perform it, if it has been neglected by their predecessors.

Under the Connecticut act this duty is devolved solely on the president and secretary, personally. A new president inherits no neglected duty or responsibility of his predecessor in office. He is made liable for his own neglect, and that only. This appears in the difference in the penalty imposed. In New York the trustees upon default, are made liable for all the debts of the corporation then outstanding, whenever contracted. In Connecticut the president and secretary are made liable only for those debts "contracted during the period of such neglect and refusal."

The duty of the president commences with his election to and acceptance of the office, and continues while he holds it. He is in no way affected by the fact, whether his predecessor has or has not complied with the law.

When, then, was it incumbent on this defendant, as president, to make and file his certificate under the law?

The act provides that he shall annually make a certificate

and deposit it "on or before the fifteenth day of February or of August." This clearly gives him the option of either of those days, provided he files his certificate annually.

This defendant was under no obligation to file any certificate on the 15th of February, A.D. 1872, for he was not then connected with the company, and was not elected president till the 17th of June, 1872. He was therefore clearly in no default for not having filed a certificate on the 15th of February.

We insist that he had his option to file a certificate on the 15th of August or on the 15th of February subsequent to his election, and would not have been in default until he had failed to file a certificate on or before each of those days.

But assume that it was his duty to make and file a certificate on the first return day after his election, to wit, on the 15th day of August, A.D. 1872. He was clearly not in default till that day had passed. He actually filed it on the 2d of September, A.D. 1872. Under no fair construction of the law can it be held that he was in default for a longer period than from the 15th day of August to the 2d of September, 1872.

Was the debt of the plaintiffs contracted during this period of neglect?

The contract for the steam engine, under which this debt was created, was made by the plaintiffs with the Odorless Rubber Company on the 8th of March, 1872, and the terms of payment were then agreed upon, long before the defendant was connected with the company. In pursuance of that contract the engine was shipped on the 21st day of June, four days after the election of the defendant as president, and the whole contract was completed and consummated by the 18th of July, 1872, about one month before the first return day after the election of the defendant, when he was required to file his certificate.

In this case the debt was contracted before the defendant was elected, and this contract ripened into a debt before he was in default.

The statute requires, not only that the debt shall be

created as a debt, but that the contract which creates it shall both occur during the period of neglect.

In the case of Garrison *vs.* Howe, 17 N. Y., 458, the trustees neglected making report as required, in January, 1850. In December, 1850, and while the trustees were in default, the plaintiff made a contract with the company to deliver lumber in the spring and summer of 1851, to be paid for by notes of the company. In January, 1851, the trustees made a report, before any lumber had been delivered under the contract. Denio, J. (see page 465), says: "We do not think a debt for lumber furnished under the contract subsequent to its execution, can be said to have been contracted when the agreement was signed. That instrument contains mutual stipulations by the plaintiff to furnish, and by the defendant to pay for, the lumber; and there is no debt in existence until lumber has been delivered. If the statute were simply a remedial one, it might be said that the plaintiff's case was within its equity; for the general object of the law doubtless was, besides enforcing the duty of making reports for the benefit of all concerned, to enable parties proposing to deal with the corporation to see whether they could safely do so. The company was in default respecting the report when the plaintiff committed himself by signing this contract. If a report had been made in January, 1850, it may be that the facts which it must have disclosed would have come to the knowledge of the plaintiff and have deterred him from dealing at all with the corporation. But the provision is highly penal, and the rules of law do not permit us to extend it by construction to cases not fairly within the language. That contemplates the simple case of a debt contracted during a default in making a report."

IV.

The act requires that the neglect and refusal to make returns shall be "intentional," in order to charge the defendant with the penalty.

The facts in this case do not warrant the presumption that there was any intentional neglect. On the other hand, the circumstances under which the defendant became connected with the company, his ignorance of their affairs before he was elected president, the short time he continued his connection with the company, the fact that he made a report within two weeks of the time fixed by law and immediately dissolved his connection with the company, are all pregnant facts, showing that the delay was necessary to enable him to discover the real condition, and that as soon as he was able he published the facts to the world, and repudiated all further connection with it, or responsibility for it.

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